

III. Remarks

A. Status of the Application

Claims 32-53 are pending herein. Claims 1-31 have been cancelled.

B. Election of Species

The Office action mailed May 5, 2005 states that:

This application contains claims directed to the following patentably distinct species: the independent and distinct ingredients of the two Markush groups recited in Claim 32, namely a first saccharide source selected from the group consisting of gum ghatti, gum tragacanth, corn starch and arabinogalactan, as set forth in the first recited Markush group; namely two saccharides selected from the group consisting of galactose, glucose, mannose, xylose, fucose, arabinose, glucuronic acid, galacturonic acid and glucosamine. The species are independent or distinct because the ingredients are characterized by divergently different chemical constituents.

This application also contains claims directed to the following patentably distinct species: the independent and distinct ingredients of Claim 51, namely and herbal extract or an extract of broccoli, brussel sprouts, cabbage, carrot, cauliflower, garlic, kale, onion, papaya, pineapple, tomato, asparagus, mushroom, parsnip, radish and turnip. The species are independent or distinct because the ingredients are characterized by divergently different botanical extracts.

Applicants hereby elect with traverse, for prosecution herein, the following:

gum tragacanth as the first saccharide source;
fucose and arabinose as the two saccharides; and
broccoli as the plant extract.

Applicants respectfully submit that claims 32-53 are readable on the elected species.

Applicants note that claim 32 of this application is directed to a method of providing saccharides that includes mixing into a single dose a dietary supplement composition that includes a nutritionally effective amount of purified acetylated mannose, a nutritionally effective amount of a first saccharide source selected from a group of four saccharide sources that are set forth in a Markush group and a nutritionally effective amount of at least two saccharides selected from a group of nine saccharides that are set forth in a Markush group. By definition, claim 32 is a generic claim because it includes two Markush groups and also because the Office action requires that a subset of the saccharide sources and the saccharides set forth in the claim be

selected for the purpose of examination. Accordingly, the statement in the Office action that: "Currently, no claims are generic" is incorrect and should be corrected on the record.

In addition, Applicants note that since claim 32 is a Markush-Type claim, the practice set forth in MPEP §803.02 must be applied to the examination of this claim. In this regard, Applicants note that MPEP §803.02 states that:

If the members of the Markush group are sufficiently few in number or so closely related that a search and examination of the entire claim can be made without serious burden, the examiner must examine all the members of the Markush group in the claim on the merits, even though they are directed to independent and distinct inventions.

Applicants note that no election of species requirement was made by the Examiner during the prosecution of parent U.S. Patent Application No. 09/242,215 which included claims that set forth Markush groups of saccharides that were very similar to the Markush group of saccharides set forth in claim 32 of this application. Accordingly, the Examiner has already conducted a search and examination of saccharides that are closely related to the search and examination of this application even though the entire group of saccharides set forth in claim 32 "are directed to independent and distinct inventions". Furthermore, the Examiner has already reviewed all the art provided by applicants in parent U.S. Patent Application No. 09/242,215. Therefore, the search for this application has already been conducted by the Examiner. In view of the above, Applicants respectfully submit that since the members of the Markush group in the claims of parent U.S. Patent Application No. 09/242,215 were sufficiently few in number that a search and examination of the entire claim was made, apparently without serious burden, and, since the search has already been conducted, the election of species regarding the saccharides set forth in claim 32 of this application should be withdrawn.

Applicants also note that MPEP §803.02 states in regard to Markush-type claims that:

"It is improper for the Office to refuse to examine that which applicants regard as their invention, unless the subject matter in a claim lacks unity of invention. Broadly, unity of invention exists where compounds included within a Markush group (1) share a common utility, and (2) share a substantial structural feature disclosed as being essential to that utility."

In the present application, the saccharides of claim 32 share a common utility and a substantial structural feature that is essential to that utility. Specifically, the saccharides of claim 32 share the structural features associated with saccharides that are essential to their common utility of being used, as claimed, in a dietary supplement. Accordingly, it is improper for the Patent Office to refuse to examine claim 32 in its present form because claim 32 sets forth what Applicants regard as their invention.

If, despite the foregoing arguments which point out why the election of species requirement is improper, the Examiner maintains the election of species requirement, Applicants further note that MPEP §803.02 states that:

“ . . . [S]hould no prior art be found that anticipates or renders obvious the elected species, the search of the Markush-type claim will be extended. . . . The prior art search will be extended to the extent necessary to determine patentability of the Markush-type claim.”

Thus, Applicants note that if no prior art is found that anticipates or renders obvious the species of claim 32 elected above, the search and examination of claim 32 will be extended.

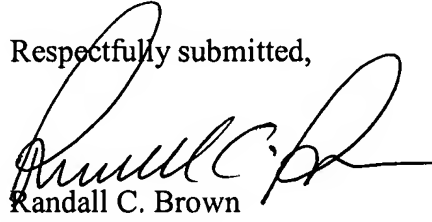
Finally, if the Examiner maintains as final the election of species requirement regarding claim 32, Applicants will take the position that the Examiner has admitted that one group of two saccharides from the Markush group of claim 32 is patentable over a different group of two saccharides from the Markush group of claim 32, and that any prior art must be closer to the elected group of two saccharides than any other group of two saccharides from the Markush group to render the elected group of saccharides unpatentable.

In view of the foregoing, Applicants respectfully request that the election of species requirement be withdrawn.

C. Conclusion

It is believed that all matters set forth in the Office action have been addressed. Favorable consideration and allowance of the elected claims are respectfully requested. Should the Examiner deem that an interview with Applicants' undersigned attorney would expedite consideration of the elected claims, the Examiner is invited to call the undersigned attorney at the telephone number indicated below.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randall C. Brown", is written over the typed name.

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